Blue Chip Casino, L.L.C., a wholly owned subsidiary of Boyd Gaming Corporation *and* Delano Roy McMillin. Case 25–CA–27856–1

March 31, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On August 16, 2002**,** Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Blue Chip Casino, L.L.C., a subsidiary of Boyd Gaming Corporation, Michigan City, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(a)

"(a) Suspending, discharging, or otherwise discriminating against employees because they engage in protected, concerted activities."

Dated, Washington, D.C. March 31, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Walter Steele, Esq., for the General Counsel.

Michael Robert Lied, Esq. (Howard & Howard Attorneys, P.C.), of Peoria, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in LaPorte, Indiana, on June 3–4, 2002. The charge was filed October 3, 2001,[1] and the complaint was issued January 8, 2002. The complaint alleges that Blue Chip Casino, L.L.C., a subsidiary of Boyd Gaming Corporation (Respondent) violated Section 8(a)(1) and (3) of the Act by suspending and then discharging Delano Roy McMillin. Respondent filed a timely answer that, as amended at the hearing, admitted the allegations of the complaint concerning the filing and service of the charge, jurisdiction, the labor organization status of the Hotel Employees and Restaurant Employees, Local 1, a/w Restaurant Employees International Union, AFL–CIO (the Union), and the supervisory and agency status of the persons named in the complaint. The answer denied the substantive allegations of the complaint. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the operation of a riverboat casino and hotel located in Michigan City, Indiana, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As indicated, Respondent operates a riverboat casino and hotel. The hotel houses about 180 rooms while the casino consists of three levels containing slot machines and gaming tables. Respondent employs about 1200 persons. Jeanne Faccadio is Respondent's director of human resources. Eileen Siordia, Respondent's manager of employees' services, reports to Fac-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Schaumber concurs in the result reached by his colleagues. He agrees that McMillin engaged in certain protected concerted activities, the General Counsel showed that those activities were a motivating factor in his discharge, and the Respondent failed to show it would have discharged McMillin absent those activities. In reaching this result, Member Schaumber does not endorse the judge's broad interpretation of protected concerted activities and does not rely on every instance of protected concerted activity found by the judge.

[3] We have modified the judge's recommended Order to more closely reflect the violations found herein.

[1] All dates are in 2001 unless otherwise indicated.

cadio. Respondent maintains a progressive disciplinary system consisting of a verbal warning, a written warning, a final written warning, and termination. Gross misconduct, however, can result in immediate termination. Respondent has an open door policy by which employees can bring matters of concern to management. It also has a procedure that employees are welcome to use to resolve grievances.

Del McMillin had worked for Respondent since July 7, 1998, as a housekeeper. McMillin had earlier worked for 36 years as a principal and guidance director in the Michigan City, Indiana school system. As a housekeeper, McMillin vacuumed carpets, and cleaned offices, restrooms, and slot machines. In his brief the General Counsel says, "McMillin while very intelligent and educated can also be seen as eccentric, and strange particularly to his less educated co-workers." Prior to the events described below, McMillin had received excellent evaluations from Respondent.

On February 6, a patron in the casino told McMillin that he had lost some photographs and asked if McMillin had found them. McMillin said no, but that he would check around with other employees to see if they had found the photographs. McMillin then approached Jimmy Sheets, a security guard, and asked him to use his radio to check with dispatch to see if they had the photographs. McMillin felt Sheets resented his request and appeared unhelpful. Sheets answered that he would talk to the patron after he completed the task he was working on. Sheets then assisted another employee in escorting the transfer of money. Once involved in monitoring the transfer of money, security officers are not allowed to be distracted until the transfer is complete, but McMillin was apparently not aware of this policy or was not aware that Sheets was escorting money. McMillin then left the area and continued to attempt to locate the lost photographs. McMillin came back to the casino area and noticed that the patron was still waiting there. McMillin then approached Sheets and asked if Sheets had radioed dispatch. McMillin then asked why Sheets had not done so earlier so that the customer would not have to be standing there.[2] Sheets, who testified that McMillin was "in his face" at that time, answered that he had been busy.[3] This incident was the start of what now is a Federal case.

Sheets then approached housekeepers Freda Johnson and Nancy Williams. Sheets was angry. He told Johnson and Williams that he wanted to talk to their supervisor because McMillin was getting on his nerves. Johnson asked what happened and Sheets said that McMillin had been bothering him about some pictures, that he did not understand why McMillin kept bothering him, and that he had things to do. Williams testified that Sheets said that if McMillin did not leave him alone he was going to kick his ass and that he did not care if he lost his job. Johnson testified that she did not hear this statement because she (Johnson) became distracted while Sheets continued talking with Williams. However, as seen below, Johnson later signed a statement indicating that she too had heard Sheets' remarks in this regard. In any event, Williams then called Kathy Willis, Respondent's casino housekeeping manager, told her about the situation, and asked her to come to the pilothouse. At the hearing Sheets was asked whether he had made any sort of threats against McMillin. He testified: "To my knowledge, no. I'm not a violent person. I had no intentions of hurting anyone. He's done nothing really to me to have me in any way harm him."[4] Willis then came to the pilothouse and talked to McMillin. Sheets then provided a statement of his encounter with McMillin, contending that McMillin had gotten in his face because he refused to be distracted while escorting money. Sheets' statement did not cover what he said to Williams and Johnson after the encounter with McMillin.

About 20 minutes after his encounter with Sheets, McMillin was summoned to Willis' office. Together they went to the pilothouse where Captain Christopher Glaser and Mate Ed Schmidt were present. Glaser asked McMillin what was going on between McMillin and Sheets. McMillin asked what Glaser meant. Glaser said that McMillin had gotten in the face of the security guard. McMillin asked to have a witness present but Schmidt responded that they would be McMillin's witness. McMillin said that he would protest that decision. Willis then explained that the guard said that McMillin had gotten in his face and had hounded him. McMillin denied this. Willis told McMillin that he could not follow a security guard and that the guard could not call and ask about photographs because security could not stop at that moment and take care of every little thing that the housekeepers asked. McMillin took this as a reprimand. He told Willis that he had been going by the handbook that said that employees are to take ownership of an issue until the issue is resolved. He denied that he was rude to Sheets. Glaser said that McMillin was not being written up for the incident. McMillin said that he did not see why he was being accused when he did not do it. He asked if someone was going to talk to Sheets. Glaser said that it was not for McMillin to know because that was an internal matter. McMillin asked if he could show them where he and Sheets had been when the incident occurred and he started to stand up. He was told to sit down. As he was sitting down Glaser said that he was done and McMillin could leave.[5] Willis conceded at the hearing that

[2] McMillin explained that according to Respondent's handbook, employees were not to leave customers waiting for long periods of time.

[3] These facts are based on a composite of McMillin's and Sheets' testimony. I credit McMillin's testimony that he did not follow Sheets around but left the area between the two conversations. I credit Sheets' testimony that he was involved in monitoring the transfer of money when McMillin first approached him. I conclude both that McMillin felt that Sheets had resented his inquiry and appeared unhelpful from his perspective and Sheets' perceived that McMillin had been too aggressive in insisting that Sheets assist him at once.

[4] I purposefully do not resolve the issue of whether or not Sheets actually threatened to kick McMillin's ass. As will be seen below, it is enough for purposes of this decision that McMillin later came to believe that Sheets had done so and that Respondent later asserted that Sheets had not done so.

[5] These facts are based on a composite of the credible portions of McMillin's and Willis' testimony. I have credited Willis' testimony that she did not raise her voice when speaking to McMillin. I have considered Glaser's testimony that McMillin did not ask for a witness. I do not credit that testimony because neither Schmidt nor Willis corroborated that testimony. In any event, I conclude that McMillin was well aware of his ability to request a witness and did so regularly.

she gave McMillin a verbal counseling at this meeting and that it was the first step in the progressive disciplinary system.

Pursuant to Respondent's open door policy, McMillin arranged a meeting with Michael Driggs, Respondent's general manager on February 22. McMillin explained that he felt that no one believed him. Driggs said that because of union considerations the matter should be taken up with human resources.

On about March 3, McMillin took up the matter with Faccadio. He complained that Willis had unfairly treated him in the pilothouse after the incident. He explained that he felt that the guard had filed a false report. Faccadio told McMillin that she would look into the matter. Faccadio then discussed the incident with Willis, Sheets, and others and determined that McMillin had behaved inappropriately in approaching Sheets and that Willis had merely counseled McMillin about the incident. Faccadio explained that counseling was not a form of discipline. After Faccadio completed her investigation of the incident one of the deckhands, Ladonna Latiker, appeared at her office and complained that McMillin had repeatedly "badmouthed" the deckhand employees by saying that they were a lazy bunch of workers who just stood around and did not work. Latiker testified that she decided to complain to Faccadio after an incident in the lunchroom where McMillin was showing employees receipts and claiming that he was a millionaire and had so much money in one bank and so much in another bank. She told McMillin at that time that no one wanted to hear what he was saying and McMillin responded that he was not talking to her but to others at the lunch table. They then exchanged words concerning whether or not McMillin was talking to her.[6] McMillin denied such an encounter but described another incident when he was talking with another employee and Latiker kept muttering under her breath that McMillin was a troublemaker. McMillin then told Latiker that he was not talking to her.

On March 8, McMillin called Faccadio and asked about the status of his complaint. Faccadio told him that now an employee had filed a complaint against him and that she was investigating the matter.

Latiker then filed a written complaint against McMillin that reads:

> This has been an ongoing issue for some time now. Dell makes comments saying those deckhands are so lazy, they do nothing and I do all the work around here. Deckhands are good for nothings. Why don't the deckhands do some kind of work, are they afraid they're gonna dirty up those nice blue uniforms? Why do the deckhands have to use my cleaning supplies, these are my cleaning tools and they're just for us housekeepers. You deckhands are so stupid and useful (sic). If there're any small problems such as a loose rack, he turns something small into something huge and raises a big fuss about the deckhands are so slow and stupid, and we can't get anything right if it's not done as rapidly as he would like. Dell complains that the deckhands are sorry individuals and are a waste of company money. Dell argues every point and makes notes of almost everything and tries to force his views and beliefs on other employees. Dell uses slandering statements to mistreat others, as well as trying to destroy character and self esteem.

At trial, Latiker recounted an incident where there was a spill and McMillin went to get a mop bucket from the housekeepers' closet only to discover that there was none because a deckhand had taken it. McMillin became angry and stated that the deckhands ought to use their own supplies.[7] Latiker described this as her biggest problem with McMillin.

On March 13, McMillin again met with Faccadio; Williams came along as his witness. McMillin had two or three pages of notes he had made to make an oral presentation to Faccadio. He began making the presentation but Faccadio interrupted and said that she was not going to hear anymore about the security guard incident. She said that she had concluded that Sheets would not have filed a false report. Faccadio then said that she had received a complaint from Latiker that claimed that McMillin had said that the deckhands were lazy, were not worth a damn, and were sorry. McMillin denied making those remarks. McMillin claimed that the only reason Latiker would make those claims was because McMillin had asked one of the deckhands to stop taking supplies from the housekeepers' closet and instead to use the supplies in the deckhands closet. At the hearing in this case McMillin denied that he ever called the deckhands lazy or said that they were good for nothing.[8] Faccadio assigned Debbie Varnak, human relations manager, the task of looking into the complaint against McMillin.

On March 16, McMillin was talking to Johnson and Williams about the security guard incident that had occurred on February 6. They told McMillin that Sheets had said on that occasion that they better get a supervisor down there because if McMillin got in his face one more time, he was going to kick McMillin's ass and leave McMillin lying on the floor.[9] McMillin asked if Williams and Johnson would sign a statement to that effect. On March 20, Williams and Johnson left the facility and traveled to a notary where they signed a notarized statement prepared by McMillin that read:

> We, Nancy Williams and Freda Johnson, witnesses, hereby declare that on February 6, 2001, we were present and heard Security Officer Jim Sheets make the following statement regarding Housekeeper employee Del McMillin: If Del comes in my face one more God damn time, I'm going to kick his ass and leave him laying in the floor because I don't give a God damn about my job.

[6] I do not credit Latiker's testimony that McMillin told to her to shut up and sit down, that she was stupid, and that she was worthless. Based on my observation of the demeanor of the witnesses and weighed against the record as a whole, I conclude that her testimony in this regard is exaggerated.

[7] McMillin explained that housekeepers and deckhands each had their own closet that they were to keep stocked with supplies from the general storeroom. He said that deckhands would take supplies from the housekeepers' closet and then when there was an emergency the supplies would not be in the closet.

[8] I find it unnecessary to resolve whether McMillin actually disparaged the deckhands; it suffices that Respondent concluded that McMillin had done so.

[9] It will be recalled that, as set forth above, Johnson testified that she became distracted and did not hear the entire conversation.

Meanwhile, during this same time period McMillin prepared a petition that read:

> Since the preponderance of inter-departmental disputes between Housekeepers and employees of other departments have been decided in favor of other departments, we, the undersigned Housekeepers, believe that there are sufficient grounds to establish that Housekeepers are not being treated by Blue Chip with parity with other department employees and are being subjected to disparate treatment impact as defined by OFCCP.

McMillin showed Williams, Johnson, and Gwendolyn Range, another housekeeper, the petition and asked them to read it and sign. They declined to sign the petition.

In March,[10] McMillin also asked the other housekeepers on the first shift if they wanted to meet at a nearby facility to discuss how to improve working conditions. He reserved a room for that purpose. He solicited the employees in the lunchroom during lunchtime. Range was one of the employees that McMillin invited. She testified that while on lunchbreak in the lunchroom McMillin asked her and other employees if they would meet with him at a nearby pub. She testified that McMillin later again asked if she was going to the meeting. Range did not go to the meeting. Instead, she told Captain Christopher Ketterer that McMillin was asking them to meet with him to talk some things over. Ketterer asked her what for, and Range replied that she did not know. Ketterer then asked what she wanted him to do and she said she wanted him to tell McMillin to quit asking her to go because she did not want to go. Ketterer asked if she wanted to write a statement on the matter and Range said that she did not because if McMillin asked her again she would return and tell Ketterer. Range never talked to Ketterer again about this matter.[11] McMillin also asked Williams to sign the petition described above concerning unfair treatment of the housekeepers. He asked her to meet in a nearby restaurant to discuss the matter. At some point Williams told Mate Ed Schmidt that she was getting a little fed up with McMillin bothering her with the "same stuff." She told Schmidt that McMillin was trying to get together with the housekeepers to form a better situation for them. Schmidt said that he would take care of it.

Meanwhile, McMillin also submitted himself to a polygraph test in order to support the credibility of his statements.

On March 26, First Mate David Wade explained Respondent's new guest service policy to McMillin and fellow housekeepers Williams and Range. The policy, in part, instructed the housekeepers to convey concerns raised by patrons to certain other employees. Wade asked if they had any questions and McMillin said that the problem was that when he tried to pass along patron concerns to slot persons and servers they would answer that McMillin was not their boss. McMillin asked if anyone had talked to them about the policy. Wade answered that he had already indicated that those issues were being addressed on a departmental level. Wade felt that Williams and Range were uncomfortable and asked if they had any questions. When they said no, he allowed them to leave. He continued the discussion with McMillin. Wade again said McMillin's issues were being addressed but McMillin persisted that he was not being heard. At some point McMillin said that the officers acted like they were a king or master race. McMillin said that it was like the Germans during World War II and he felt like a Jew.[12] Wade asked if McMillin was accusing him of being a racist and McMillin said no. McMillin explained that he was just making references. Wade asked if McMillin wanted to discuss the matter with human relations and McMillin said no. Wade said that if McMillin were so unhappy working there that he could quit.

Later that same day McMillin walked over to where Williams, Range, and Elizabeth Martin, another housekeeper, were sitting in the lunchroom and asked if they were willing to be a witness for him when he took his grievance to the next higher step. Martin said that she was not interested and Williams said that the matter was already over. McMillin later returned to their table and attempted to show them that the matter was not over because the handbook permitted him to take his grievance on further. The women replied that they did not care about it. McMillin returned yet a third time and attempted to talk about *Weingarten*[13] rights. They again declined to get involved. During the course of these discussions McMillin made statements to the effect that management can break one finger, but not a whole hand and that the employees may be the next in Mike Driggs' office. Later that day Williams signed an employee statement that complained that McMillin was "really getting on some of the girls' nerves." The statement described how the employees were on lunchbreak and McMillin kept running back and forth to their table. She described how McMillin wanted someone to go with him to see Mike Driggs concerning a matter that they felt had already been dropped. She complained that McMillin kept pushing his issues on everyone, that they did not feel the same about those issues, and that McMillin would get mad. She explained that this has been going on since the meeting with Faccadio on March 13, and she was tired of McMillin trying to pressure her. Williams testified that because she was a union steward, employees complained to her about McMillin.

In a statement prepared that day, Ketterer described the events of that day as follows:

> Housekeeping Supv. Kathie Willis reported to Mate David Wade and myself that a few of the housekeepers were uncomfortable with some actions Del McMillin was taking toward them. At the time I decided to speak with housekeepers who were feeling uncomfortable. I asked housekeeper Gwen Range to come to the pilothouse to discuss the situation. Gwen informed me that on numerous occasions Del had

[10] Contrary to the General Counsel's assertion in his brief that these events occurred in January, I credit McMillin's testimony that they occurred in March.

[11] These facts are based primarily on the version of this conversation that Range gave in response to my questions.

[12] McMillin admitted that he made reference to a king and master race; he denied that he said anything about Germans or Jews. Based on my observation of the demeanor of the witnesses, I do not credit that denial.

[13] *NLRB v. Weingarten*, 420 U.S. 251 (1974).

made her feel uneasy. She stated that while she was at lunch today with Nancy Williams and Elizabeth Martin, Del came over to their table and asked one of them to go to a meeting in Mike Driggs' office with him. I was told that the ladies all replied that they weren't interested in going to this meeting. A few minutes later, Del came back over to the table and asked the ladies again to come with him stating that they all needed to stand together to get things done. She stated that he said something to the effect of, they can break one finger, but not a whole hand. Gwen stated that she felt intimidated by Del's language in that several times he told her that she may be the next one in court, or the next one in Mike Driggs' office if she did not agree with him. Again a few minutes later, Del came over to their table again and Gwen said that she got up and left the table without finishing her lunch because she did not want to be bothered on her lunch break. On another occasion, Gwen stated that Del had also been attempting to pass a petition amongst the housekeepers, but she stated that she did not know what it was pertaining too (sic) and did not sign it. Gwen said that he also was pressuring her to attend a meeting outside work that she was not able to attend due to a medical situation in her family. She stated that Del was very upset with her that she did not attend this meeting.

I asked Gwen if she wanted to make a written statement about what happened, and she replied that she did not want to at this time. She added that if a similar situation arises again she would make a statement. I then called Nancy Williams to the pilothouse to discuss the various incidents regarding Del. She stated that she had been having several problems with him. I discussed the situation with her and asked her to make a statement pertaining to her dealings with Del. Her statement is included with this corrective action form. I was unable to speak with Elizabeth Martin before she left at the end of her shift. She is scheduled off for the next two days and I will try to contact her at home.

Still later that same day McMillin encountered Wade and asked if it was in accord with Respondent's open door policy if an employee raises a sincere work-related matter and management responds by telling the employee that he should resign if he is not happy. McMillin emphatically showed Wade the portion of the handbook dealing with Respondent's open door policy.[14] Wade invited McMillin to discuss the matter with human resources. Ketterer overheard the conversation and asked them to come to his desk. Ketterer said that he had a complaint that McMillin had been too insistent in trying to get witnesses. McMillin replied that he was just practicing his *Weingarten* rights. Ketterer said that he did not want McMillin doing that any more;[15] McMillin said okay. McMillin repeated his earlier statement about the Germans and feeling like a Jew. McMillin raised his voice during this meeting.[16] Wade replied that he thought this remark was racist and at this point that he called human relations. Wade then announced that Faccadio wanted to talk to them. They went to Faccadio's office, where Faccadio then told McMillin that he was suspended. In the same statement prepared that day, Ketterer described the events as follows:

At the end of the shift, Del came to the pilothouse and asked Mate David Wade for a copy of the employee handbook, which David provided him. He then turned to page 25 and read the statement pertaining to the zero tolerance policy for managers or supervisors who interfere with the use of the open door policy. He said that he twice now has been told that if he does not like it here he can resign. I informed him that his statement was not preventing him from using the open door policy, rather he was stating that if he thought the treatment that he was receiving here, and the conditions he works under, are that difficult for him that maybe this was not the right position for him. Mate David then suggested that we use the open door policy at this time and go to Human Resources to discuss his concerns. Del stated that he did not want to go to Human Resources. At this time, Del began to raise his voice saying that he was being treated unfairly. Mate David called Human Resources to update Deb Varnak of the situation. I explained to Del that we should go to HR since he was inferring that we did not want him to use the open door policy. I then asked Del to take a seat and began to address some of the concerns that had been brought to my attention earlier during the day. I informed him of the complaints that I had received earlier that day. He acknowledged that he had done this, and stated that he would not let if happen again. Mate David then told Del that we could go to HR to discuss his concerns. Again Del said that he did not want to go to HR. Del spoke to Deb Varnak on the phone and then went along with myself to a meeting in Jeanne Faccadio's office. Once in Jeanne's office, I reviewed the situation as described above for both Jeanne Faccadio and Annette Corbett. I also presented Jeanne with a copy of Nancy Williams' statement. After reviewing the statement, and discussing the situation with Del and I it was determined that Del would be suspended while an investigation was conducted.[17]

Ketterer then prepared a "corrective action notice" for McMillin on which Ketterer wrote:

Inappropriate actions toward co-workers and raising his voice while speaking to Mate David Wade and Capt. Chris Ketterer. This corrective action is a final warning and any continuance of this conduct will result in termination.

[14] I do not credit Wade's testimony that he felt threatened by McMillin's this conduct. Based on my observation of his demeanor, I conclude that this testimony is exaggerated.

[15] The General Counsel does not allege that this statement violated the Act.

[16] At the hearing McMillin denied that he had raised his voice during his conversation with Ketterer and Wade. I do not credit that testimony. Ketterer testified that McMillin was "kind of ranting and raving." I do not credit that testimony either. Instead, I conclude that McMillin had raised his voice in this conversation.

[17] The General Counsel does not allege that this suspension violated the Act because it is outside the 10(b) period.

The notice indicated that McMillin had been counseled concerning the security guard incident on February 6. Ketterer admitted that the reference to "inappropriate actions toward coworkers" pertained to McMillin's efforts in the lunchroom to try and get employees to attend the meeting. He knew from the employees that McMillin wanted them to go with him and meet with the general manager, to be a witness, and to meet with McMillin outside the premises. He gathered from the statements of the employees that McMillin wanted them to be together in dealing with management. He explained that it was inappropriate for McMillin, once he was told no by the employees, to come back 5 minutes later and do it again; that when the employees said that they did not want to talk about it McMillin kept coming back. The General Counsel asked Faccadio whether the language in the notice "Inappropriate actions toward co-workers" referred to McMillin's attempts to have the three employees serve as a witness concerning his complaint against the security guard. Faccadio answered "All I know is that we had more (than) three employees raise complaints against [McMillin] because they considered he was harassing them in the employee cafeteria by badgering them to go do something with him that they didn't want to participate in." When asked why Respondent did not issue McMillin a written warning first before firing him, Faccadio testified that in cases of gross misconduct, progressive discipline is not followed. She characterized the March 26 suspension as resulting from gross misconduct. She explained that McMillin was being given a chance when he was suspended for the incident as opposed to being terminated.

On March 29, Elizabeth Martin provided Ketterer with a statement that read:

> On Sunday I was sitting in the lunchroom and Del came up to ask me if I would go with him to sit in on a case he has and I said no. He got upset about it and kept coming back. I do not want to be involved with what he is doing. But if you tell him no he just keeps coming back and putting papers in your face and says read this. I just would like Del to keep his comments to himself and just leave me alone about things unless it has to do with work.

Meanwhile, on March 26, Varnak prepared a written report of her investigation concerning whether McMillin had made disparaging remarks about the deckhands. Her report indicated that one employee reported that McMillin frequently made negative remarks about the deckhands, but he did not take those remarks seriously. A deckhand said that she never heard McMillin make negative remarks. She explained that others had said that McMillin made such remarks but she had never heard them. She also explained that McMillin had been her teacher in high school and never did anything to bother her. Another deckhand said that McMillin regularly made negative remarks about the deckhands. He stated that McMillin complains when deckhands remove items from the housekeeping closet instead of using their own closet. This deckhand stated that McMillin had been much nicer over the past few weeks and that he had been McMillin's student in high school also. A third deckhand said that McMillin had regularly made negative remarks about deckhands such as they do not work hard enough or are lazy. Faccadio reviewed this report before McMillin was suspended again on April 7. Based on the report she concluded that McMillin had lied to her earlier when he had denied making derogatory remarks about the deck hands. She testified that she confronted McMillin with the report and that McMillin lied again when he denied making those remarks.

While serving the March 26 suspension McMillin sent Faccadio two certified letters. The first read:

> The purpose of this letter is to notify Blue Chip Casino's Director of Human Resources Jeanne Faccadio that I, Delano McMillin, am concerned about my physical safety at the Blue Chip Casino because I have been informed by notarized statements of witnesses that Security Officer Jim Sheets has threatened to do bodily harm to me. I need the assurance of the Blue Chip Casino that when I return to work that Blue Chip Casino will fulfill its fiduciary responsibility to provide a work place safe from work place violence.

The second letter discussed in detail why McMillin was concerned about the statements that Sheets had allegedly made. In that letter McMillin stated that Sheets' "words felt very real to me." McMillin returned to work on April 2.

On April 7, McMillin met with Captain Glaser and Mate Schmidt. He handed them a copy of the notarized statement that Williams and Johnson had signed concerning the remarks that Sheets had made after the February 6 incident, except that he redacted their names. McMillin explained that he did so in an effort to protect them from retaliation. Glaser made a copy of the statement. Glaser asked if McMillin pressured the employees to sign the statement; McMillin said no. Schmidt examined the statement and said that he could tell that the employees signing the statement were Johnson and Williams despite the attempted redaction. Schmidt asked McMillin why he did not just drop the matter. McMillin answered that he was trying to clear his name; that was what a person does in a slander or defamation case. He gave an example of General Westmoreland during the Vietnam War. Schmidt replied that McMillin was not Westmoreland and this was not the Vietnam War. Schmidt said that if McMillin did not stop this, something worse was going to happen to him.[18]

About 20 minutes later McMillin was summoned back to the pilothouse. Willis was with Glaser and Schmidt this time. McMillin asked for a witness and Glaser said that he and Willis would be his witness. McMillin protested. They then said that McMillin was suspended. The documents concerning this suspension indicate only that McMillin was suspended pending investigation.[19] Faccadio testified that she decided to issue this suspension because of a "combination of things that were hap-

[18] The General Counsel does not contend that this statement violated the Act.

[19] These facts are again based on McMillin's testimony. I have considered Glaser' testimony that he had been advised the day before to bring McMillin to human resources so that he could be suspended and despite seeing McMillin that morning he had forgotten to bring him to human resources at that time, that Schmidt did not say that something worse would happen to McMillin if he did not drop the matter, and that McMillin did not ask for a witness to be present. Based on my observation of the demeanor of the witnesses I do not credit that testimony.

pening with Del involving the dishonesty, the insubordination, the harassment, just the ongoing inappropriate behavior with him."

On April 10, Respondent terminated McMillin. Faccadio and Siordia met with McMillin and his witness. Faccadio asked him for the names of the employees who had signed the notarized statement. McMillin said that he preferred not to give them until he reached the top level of the procedure. Faccadio testified that she told McMillin that he was terminated for lying, harassing, and being insubordinate. McMillin said that he had taken a polygraph test and offered to supply it to her.[20] Faccadio declined. The termination documents indicate that McMillin was discharged for misconduct. The written comments indicate "falsification & misconduct." Faccadio testified that the misconduct was insubordination and harassment of his coworkers.

On April 17, McMillin met with General Manager Driggs. McMillin gave him a copy of the notarized statement with nothing redacted. He also attempted to present the results of his polygraph test. Driggs interrupted and said that he had decided to sustain Faccadio's decision to terminate him. Nonetheless Faccadio investigated the matter. During that investigation, Johnson signed a statement that read:

> The day of Feb. 6 the sec. officer came and ask me and Nancy where were [sic] our boss at and we told them she was some where on the floor. He said then I need to talk to her. I said to him about what. He said about one of the housekeepers Del. I asked him then what did Del do. He said that he keep coming up to me about some pictures a man lost did I find them. I said no. He (illegible) in a few min. He had come back again and asked me the same thing. I told him then that I was tired of this shit. He told him leave along [sic]. He asked if I find Cathy then said he look for her instead. He said because he ain't going to be messing with me. I am sick of that shit. Then I told him I said you look really mad said I am cause I am trying to do my job ain't got time for that shit. I don't remember him threatening him. I felt bad for Del at the time because he was going through this and yes I told him I would sign but I only signed because I know what I heard him say.

Faccadio testified that during her investigation of McMillin's claim that he had been threatened by Sheets, she spoke with Williams. Faccadio claimed Williams said that she signed the statement indicating that Sheets made the threat "(t)o get [McMillin] off of my back." Yet Williams consistently testified that Sheets had, in fact, made those remarks and reiterated them in a statement provided to Faccadio on April 17. I do not credit Faccadio's testimony in this regard. At some point Sheets was asked to provide a statement concerning the claim that he had threatened McMillin. He wrote:

> As far as ever threatening him, I don't recall ever doing so, and if I said something to anyone that sounded threatening toward him I can't recall that either. In conclusion I thought this issue was done and over with and never wanted any trouble with this man nor get him in any trouble.

McMillin availed himself of the final step Respondent's appeal procedure. That procedure allows an employee to present his case to the general manager and then have his case heard by a panel of his peers. This panel then acts much like an arbitrator. On May 8, McMillin appeared before the panel, but his appeal was denied.

Respondent contends that McMillin was terminated for a combination of insubordination and dishonesty. It described the nature of the insubordination as, "[i]n large part, refusing to let other employees alone after they had expressed that they did not want to get involved with Mr. McMillin." Faccadio testified that she decided to fire McMillin because he kept lying to her. She stated that he lied to her concerning the deckhands, about harassing the housekeepers, about the workplace violence because he had not heard that directly from Sheets. She also stated that she terminated him in part because of:

> a continued method on his part to persist in a matter that could have been dropped the first time out and then, when he brought in about the lady at the end, he had some kind of a notarized or subpoena form, and he had blackened out the name. I said 'Del,' and he presented a whole new set of facts to me at that point. I said 'Del, if you give me the name, I will investigate or reinvestigate,' and he refused to give me the name. That is interfering with an investigation on top of the number of times he had lied to me already. The decision was made he was an inappropriate employees and no longer could work at Blue Chip.

At an unemployment compensation hearing that followed McMillin's termination, Respondent, through Ketterer and Siordio, took the position that McMillin was terminated because he continued to ask his fellow employees to attend meetings and to act as a witness in meetings with management. They made no mention of insubordination, lying, or any other reason.

McMillin also filed a claim with the Indiana Civil Rights Commission alleging that he had been fired because of a disability.

Regarding the allegation that McMillin was terminated because of his union activities, the parties stipulated that the Union was certified in July 2000, and that a contract was reached in September 2001. However, contrary to that stipulation Faccadio testified that Respondent agreed to a card check in March 2000 with the Union. That card check occurred on July 26, 2000, and Respondent then recognized the Union pursuant to that card check and that at some later point the parties reached a collective-bargaining agreement. The General Counsel acquiesced to this testimony. McMillin testified that he supported the Union and talked to employees informally and told them that he thought the Union was a good idea and the dues they

[20] In its brief Respondent contends that I erred in admitting the polygraph results into evidence. I reject this contention. I accepted the polygraph results only as a document proffered by McMillin to Respondent, but not as substantive evidence. I have given no weight to the substance of the polygraph results in this decision. Respondent also argues that I erred in receiving GC p. 16 on the grounds that it was cumulative, self-serving; and as being a calculated effort by McMillin to create evidence. I again disagree. This document also was not received as substantive evidence but instead to rebut Respondent's implied assertion that McMillin's testimony had been recently fabricated.

paid were worth the benefits that they would receive. This occurred sometime in late 1999 or 2000. McMillin conceded that he was not an organizer for the Union. In around March he wore a 3-inch button that read "No Contract Yet." Mate David Wade told him to take off the button and he did. McMillin wore the button for about an hour and did not wear it again after Wade's instruction. Faccadio testified without contradiction that the Union agreed to waive the right of employees to wear buttons and that when a contract was reached employees were permitted to wear union buttons but only of a certain size. She testified that the button that McMillin wore was bigger than what the Union had agreed to in negotiations. Faccadio credibly testified that she had no knowledge that McMillin had been an active union supporter.

III. ANALYSIS

The General Counsel alleges that McMillin was fired because he engaged in protected, concerted activity as defined in Section 7 of the Act. In *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), the Board explained that activity is concerted if engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself. Id. at 497. In *Meyers Industries*, 281 NLRB 882 (1986) (Meyers II), the Board stated that for individual activity to be concerted it must be designed to initiate or induce or to prepare for group action or must concern truly group complaints. The Board has long held, with court approval, that concerted activity may consist solely of a speaker and a listener, so long as the speaker is seeking to induce group action. This is so because such activity is viewed as an indispensable first step to employee group activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d. Cir. 1964). Under this standard, McMillin's efforts to get fellow workers to sign the petition about the allegedly unfair treatment of housekeepers constitute concerted activity. His efforts to persuade employees to attend a meeting outside of the workplace to discuss working conditions likewise are concerted activity. His efforts to persuade employees to appear as a witness on his behalf in his encounters with supervisors is also concerted activity, as were his attempts to inform employees of their *Weingarten* rights. McMillin's successful efforts to have employees sign the statement concerning Sheets' alleged threat also is concerted activity since it was group activity designed to support McMillin's expressed concern of workplace violence. The conveyance of that group activity to management was likewise concerted activity. I also conclude that McMillin's request to management that he be permitted to procure a witness during his meetings with management also is concerted activity because it was designed to induce group activity.[21] Respondent argues that McMillin's activity concerning the encounter with Sheets was not concerted but simply a personal effort to "clear his name." But the short answer is that he solicited other employees to assist him in that effort, sometimes successfully, often not. It is this conduct that I conclude is concerted.

Although McMillin's March 26 suspension is not alleged to be unlawful because of the Act's 6-month statute of limitations, the General Counsel argues that this suspension sheds light on the motive of McMillin's subsequent suspension and termination. I therefore examine that suspension. As described above, the corrective action notice for this suspension indicated that McMillin was suspended for "Inappropriate actions toward coworkers and raising his voice while speaking to Mate David Wade and Capt. Chris Ketterer." Ketterer admitted that the reference to "inappropriate actions toward co-workers" pertained to McMillin's efforts in the lunchroom to try and get employees to attend the meeting. He knew from the employees that McMillin wanted them to go with him and meet with the general manager, to be a witness, and to meet with McMillin outside the premises. He gathered from the statements of the employees that McMillin wanted them to be together in dealing with management. He explained that it was inappropriate for McMillin, once he was told no by the employees, to come back 5 minutes later and do it again; that when the employees said that they did not want to talk about it McMillin kept coming back. Faccadio also admitted that McMillin was suspended because of his efforts to get employees to participate with him on matters dealing with working conditions.[22] Respondent's position at the unemployment compensation hearing further supports this conclusion.

Respondent argues that McMillin's activity lost the protection of the Act because his "harassing and overly persistent manner," citing *Patrick Industries*, 318 NLRB 245 (1995), and *NLRB v. General Indicator Corp.*, 707 F.2d 279, 282 (7th Cir. 1983). I disagree. McMillin's activities took place during nonworking time. McMillin was indeed persistent in his efforts to have the employees sign the petition, meet outside work to address workplace concerns, and have an employee join him in his meeting with management. However, McMillin's level of persistent did not exceed the bounds of protected conduct. Respondent points out how McMillin solicited employees during their lunchtime on three occasions in rapid succession to serve as his witness. However, each instance of solicitation had a different purpose. McMillin first asked if the employees would serve as a witness. The response was that the matter was over. McMillin returned later with a copy of the appeals procedure to demonstrate that the matter was not over because he could appeal. He was again rebuffed. He returned later to explain the *Weingarten* case to the employees. This conduct does not exceed the bounds of protected conduct. Respondent points out that the employees were subjectively annoyed or angered by McMillin's conduct. But the standard for assessing whether conduct remains protected under the Act is an objective standard, *Consolidated Deisel Co.*, 332 NLRB 1019 (2000), and I have concluded that McMillin's conduct remained

[21] The General Counsel urges me to rely on *Epilepsy Foundation*, 331 NLRB 676 (2000). I find it unnecessary to rely on that case because the General Counsel has not alleged that Respondent violated the Act by refusing to allow McMillin to have a witness. I conclude only that McMillin's request was concerted activity; I do not decide whether or not Respondent had to grant that request.

[22] At another point in her testimony Faccadio testified that she did not know what McMillin was asking the housekeepers. She testified that she could not remember whether she asked McMillin what he was asking the housekeepers to do. I do not credit Faccadio's testimony on this matter.

protected under that standard. The Act designs a system where employees decide for themselves whether to engage in concerted activity. As part of that system it is necessary that discussion among employees and attempts to persuade be robust and vigorous. A necessary consequence of such robust discussion is that some employees may feel annoyed or otherwise upset by the efforts to persuade them. But employees may have to endure some level of annoyance if the Act's goals are to be achieved. Nor did the manner in which McMillin exercise his rights exceed the bounds of proper conduct. There is no evidence of any threats or intimidation.[23] Respondent next argues that the employees complained and that it was obligated to act under its harassment policy. However, Respondent may not use its harassment policy to nullify the rights of employees protected by the Act. *Consolidated Deisel*, id. I conclude that the concerted activity that McMillin engaged in was protected under the Act.

In determining whether an employee has been disciplined because of his concerted activity, the General Counsel must show that the employer knew of the concerted nature of the activity. *Meyers II*, supra. From the testimony of Ketterer and Faccadio described above as well as other testimony set forth above, I conclude that Respondent was well aware of the concerted nature of McMillin's activity. Indeed, the testimony of Ketterer and Faccadio also amounts to an admission by Respondent that it suspended McMillin, in part, because of the concerted activity. Of course, Respondent also asserts that it disciplined McMillin in part because he had raised his voice in the meeting with Wade and Ketterer. At this point the burden shifting analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), requires that Respondent show that it would have suspended McMillin in any event for raising his voice during the meeting with Ketterer and Wade.[24] Respondent is required to show not that it may have suspended McMillin for that conduct, but that it would have done so. But the record is barren of evidence that Respondent routinely suspends employees for raising their voices during discussions of grievances with management. In its brief Respondent also contends that McMillin was insubordinate not only by raising his voice but by making "racially insensitive remarks" in obvious reference to McMillin's statement concerning Germans and Jews. I reject this contention. The disciplinary notice states: "Inappropriate actions toward co-workers and raising his voice while speaking to Mate David Wade and Capt. Chris Ketterer." (Emphasis supplied.) It makes no mention of the content McMillin's remarks and I conclude that this is first of several attempts by Respondent to create after-the-fact arguments to strengthen its case. I thus conclude that Respondent's suspension of McMillin on March 26 was motivated in substantial part by his protected concerted activities and that this conclusion sheds light on the motive for the suspension and termination that followed quickly thereafter.

I now address the matter of McMillin's suspension on April 7, and his termination on April 10. During the time between the March 26 and April 7 suspensions three matters of consequence occurred. First, Varnak issued an investigative report from which Faccadio concluded that McMillin had in fact disparaged the deckhands. Next, Martin gave a statement confirming that McMillin had asked her to be a witness for him in his dealings with management. Finally, McMillin asserted that Sheets had verbally made threats directed at him and claimed to have a notarized statement signed by witnesses. Faccadio explained that she decided to again suspend McMillin because of a "combination of things that were happening with Del involving the dishonesty, the insubordination, the harassment, just the ongoing inappropriate behavior with him." I have already concluded above that "harassment" referred to McMillin's conduct that was concerted activity protected by the Act. Martin's statement only served to reinforce that conclusion. I therefore conclude that the General Counsel has established his initial burden of showing that the April 7 suspension was motivated in substantial part by McMillin's protected concerted activities.

The burden now shifts to Respondent to show that it would have again suspended McMillin in any event, apart from his protected concerted conduct. Respondent claims that McMillin was disciplined for dishonesty. The dishonesty, Respondent contends, consisted of several instances. First, relying on Faccadio's testimony, Respondent claims that McMillin was dishonest when he claimed that Sheets had directly threatened him. The problem with that contention is McMillin never made such an assertion. Indeed, his letter to Faccadio said clearly: "I have been informed by notarized statements of witnesses that Security Officer Jim Sheets has threatened to do bodily harm to me." I do not credit Faccadio's testimony in this regard. In fact, this assertion is so weak that it leads me to conclude that it was created after the fact for no other reason than to attempt to strengthen Respondent's case. Second, Respondent argues in its brief that McMillin was dishonest when he claimed that he had been "excoriated" by Willis on February 6. It is difficult to see how this remark qualifies as "dishonesty." Obviously, McMillin genuinely felt he had been disciplined in some fashion by Willis' remarks. The incident with Willis did, in fact, occur. The fact that many people would not characterize Willis' remarks as "excoriation" does not negate the fact that McMillin may have subjectively perceived it as such. In any event, Respondent has not shown any instance where it has considered similar remarks as "dishonesty" meriting discipline.[25] Respondent next argues in its brief that McMillin was

[23] McMillin's comments to the effect that a hand is stronger that a single finger was simply an attempt to persuade the employees that collective action may be more effective than individual action. The Supreme Court has described concerted activity as an effort to "equalize the bargaining power of the employee with that of the employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. *NLRB v. City Disposal*, 465 U.S. 822 (1984).

[24] I find it unnecessary to decide whether McMillin's conduct in that meeting itself constituted concerted activity and whether raising his voice fell within an acceptable part of that activity. See *Thor Power Tool*, 351 F.2d 284 (7th Cir. 1965).

[25] In its brief Respondent notes that pursuant to subpoena it provided the General Counsel with the disciplinary records of 42 employees yet the General Counsel introduced into evidence the records of only 13 of those employees. Respondent argues that I should infer that remaining

"dishonest" about harassing other employees. However, I have concluded above that this conduct did not constitute harassment but was instead protected, concerted activity. Respondent's argument in this regard only serves to strengthen the case against it. Finally, Respondent argues that McMillin was dishonest when he denied having made disparaging remarks about the deckhands. Respondent, citing *6 West Limited Corp. v. NLRB*, 237 F.3d 767 (7th Cir. 2001), argues that it is entitled to be strict in the manner that it handles dishonest employees. Indeed it may. But Respondent has failed to show that it has been "strict" in this regard. More precisely, Respondent has failed to show that when employees present differing versions of an event, it makes a credibility determination and then disciplines the employee not based on the underlying event, but instead disciplines the employee against whom it has made its credibility resolution for dishonesty. That is what Respondent asserts it did in this case yet it has failed to show the existence of such a policy. Respondent argues that it has met its burden when it introduced into evidence a list of employees and supervisors who had "dishonesty" listed as the reason for termination. But Respondent failed to define what it means by "dishonesty." Without such a definition the mere listing is of little use in assessing whether Respondent would have terminated McMillin for the type of "dishonesty" that he was accused of. In fact, the General Counsel introduced the disciplinary records of some of the individuals on Respondent's list to support his case. As an example, take the record of George Plantiga, one of the persons listed as having been terminated for dishonesty. Plantiga was hired August 18, 1997. A year later, after Respondent concluded that he had falsified his employment application he was not fired for "dishonesty" but was merely suspended. In July 2000, surveillance caught Plantiga finding a wallet in the employees' smoke room. Plantiga did not turn the wallet into security. For this conduct Plantiga received a written warning. In March 2001, Plantiga received another written warning for "Failure to maintain the highest degree of service and courtesy . . . with co-workers and guests." That warning indicated that earlier that year Plantiga was counseled for "Disrespectful comments or conduct toward anyone . . . ." In September that same year Plantiga received a final warning for same misconduct. In November Plantiga was suspended for a number of reasons, including the same reason that he had earlier been warned about. On November 12, 2001 Plantiga was fired for "Stealing company time." No further explanation is provided in the record. Respondent points to the record of Cornell Irby, listed as having been terminated for dishonesty and whose record was also introduced by the General Counsel. Irby was hired in July 1997. In March 1998 he, like McMillin, had a "verbal and attitude conflict with fellow employee Donna Latiker." For this he received a verbal warning. In May 2000, Irby was suspended pending an investigation to determine if he should be fired for allegations of sexual harassment. In July that same year he was again suspended for the identical reason. On July 13, 2001, after McMillin had been fired, Irby too was fired. The records indicate that he was fired for sexual harassment, but Faccadio added on the form "& lying during an investigation." Irby's record adds little to Respondent's case. In fact, to the contrary, it shows that when another employee had a run-in with Latiker, that employee was only given a verbal warning. At the hearing Faccadio testified that two of the listed individuals were terminated because they "lied during the investigation." But even this testimony falls short of the specificity needed to compare their discipline with McMillins. Remember, the burden is on Respondent at this point of the legal analysis. I conclude that Respondent has failed to show that it would have suspended McMillin for "dishonesty" even in the absence of his protected, concerted activity.

Next, Respondent argues that McMillin was suspended on April 7 because of insubordination. Yet McMillin had just served a 3-day suspension due, in part, to his alleged insubordination and Respondent points to no additional acts of insubordination during the short period of time that McMillin had returned. Of course, as described above when McMillin returned to work he continued to press his grievance against Sheets and presented Respondent with the notarized statement of the two supporting employees and Schmidt warned that if he did not stop this, something worse was going to happen to him. But McMillin's conduct, because it involved the support of two employees, constituted concerted activity protected by the Act. Thus, Respondent could not lawfully require McMillin to desist from such concerted conduct. Rather, this evidence tends to support the conclusion that McMillin was suspended on April 7 because he engaged in protected, concerted activity.

Finally, Respondent contends that McMillin would have been suspended in any event because it concluded that he made disparaging remarks about the deckhands. However, Respondent's burden at this point is more than simply pointing to misconduct; it must show that it would have taken the same discipline based on the misconduct. Respondent points again to the list of names of employees and supervisors it introduced into evidence. That list gives the names of nine individuals and indicates that the reason they were terminated was "Talking badly to or making disparaging comments to co-workers." But this evidence is simply not specific enough to meet Respondent's burden. I conclude that Respondent has not shown that it would have suspended McMillin on April 7 even in the absence of his protected activity. It follows that by suspending McMillin on April 7 because he engaged in protected, concerted activity, Respondent violated Section 8(a)(1).

McMillin was terminated on April 10. Little had changed since he was unlawfully suspended on April 7. Immediately before his termination McMillin indicated to Faccadio that he still intended to pursue the concern of his workplace safety, supported by other employees. Faccadio asked for the names of the employees, but McMillin declined, stating that he preferred to give the names at a higher level of the grievance procedure. I have already concluded that McMillin was engaged in protected, concerted activity by pursuing this matter in that manner that he had. Respondent now asserts that a reason that McMillin was terminated was because he obstructed the investigation of his own grievance by refusing to provide the names

29 disciplinary records support its position. I make no such inference because it can be also be argued that if the records supported Respondent's position it would have offered them into evidence and therefore a negative inference should be drawn against Respondent.

of the witnesses. This argument does not withstand scrutiny. I have concluded above that McMillin apparently had not done a good job redacting those names because Schmidt was able to accurately determine the names of the two employees who had signed the notarized statement. Thus, Respondent had the information it needed to do the investigation. Importantly, Respondent has failed to show that it has a policy of terminating employees who fail to give the names of witnesses to events. In any event, based on my observation of Faccadio's demeanor, I do not credit her testimony on this contention and conclude that it was another afterthought. By terminating McMillin on April 10, Respondent violated Section 8(a)(1).

Finally, I address the General Counsel's contention that McMillin's suspension and termination also violated Section 8(a)(3) of the Act. I again use the *Wright Line* framework. The General Counsel has established that McMillin engaged in union activity when he wore the "no contract yet" button on one occasion. However, this hardly set McMillin apart as a leading supporter of the Union. The General Counsel has shown that Respondent was aware of that activity by virtue of the fact that Schmidt told McMillin to remove the button. The General Counsel relies on Schmidt's statement as evidence of animus. However, the record in this case does not allow me to make that conclusion. This is so because there is unrebutted testimony that the Union agreed that employees could wear buttons of only a certain size and McMillin's button exceeded that size. Although the record is not clear when that agreement was reached, it is the General Counsel's burden to establish animus and this record evidence is not sufficiently persuasive. This is especially so because McMillin compliantly removed the button when instructed to do so and did not wear it again. Also militating against a finding of animus is the fact that Respondent apparently voluntarily recognized the Union after a card check and then entered into a collective-bargaining agreement with the Union. I also note that the element of timing does not support the General Counsel's case. Under these circumstances I conclude that the General Counsel has not met his initial burden and I shall dismiss that allegation of the complaint.

CONCLUSION OF LAW

By suspending and then terminating Delano McMillin because he engaged in protected, concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

The Respondent having discriminatorily suspended and discharged Delano McMillin, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Blue Chip Casino, L.L.C., a subsidiary of Boyd Gaming Corporation, Michigan City, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Delano McMillin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make McMillin whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify McMillin in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Michigan City, Indiana, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respon-

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 16, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Delano McMillin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Delano McMillin whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Delano McMillin, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

BLUE CHIP CASINO, L.L.C., A WHOLLY OWNED SUBSIDIARY OF BOYD GAMING CORPORATION